

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

CHANGEPOINT USA LLC; CHANGEPOINT §
(CANADA) ULC, §

Plaintiffs, §

v. §

DELL GLOBAL B.V. §

Defendant. §

Civil Action No. 1:17-cv-00081

JURY TRIAL DEMANDED

PLAINTIFFS' ORIGINAL COMPLAINT

Plaintiffs Changepoint USA LLC and Changepoint (Canada) ULC (collectively “Changepoint”), by and through its undersigned counsel, file this Original Complaint against Defendant Dell Global, B.V. (“Dell Global”), and allege as follows:

INTRODUCTION

1. Changepoint brings this action to recover damages and obtain equitable relief against breach of contract and copyright infringement by Dell Global. Dell Global has reproduced, distributed, sublicensed, and/or otherwise misused Changepoint’s software product (the “Changepoint Software”), without authorization and without payment of proper compensation. Dell Global’s conduct violates Changepoint’s copyrights and written agreements between Changepoint and Dell Global.

PARTIES

2. Plaintiff Changepoint USA LLC is a Delaware limited liability company with its principal place of business in Seattle, Washington. Its sole member is Changepoint BV, a Dutch private company.

3. Plaintiff Changepoint USA LLC is the successor in interest to all rights of certain assets it acquired from Compuware Corporation, as a result of an asset purchase that closed on January 31, 2014.

4. Plaintiff Changepoint (Canada) ULC is a Canadian limited liability company with its principal place of business in Richmond Hill, Ontario Canada. Its sole member is Changepoint BV, a Dutch private company.

5. Plaintiff Changepoint (Canada) ULC is the owner of copyright registrations in the Changepoint Software as detailed herein.

6. Defendant Dell Global, B.V. ("Dell Global") is a Netherlands corporation with its principal place of business in Round Rock, Texas. Dell Global may be served with process via its registered agent, CSC, 211 E. 7th Street, Suite 620, Austin, Texas 78701.

NATURE OF THE CLAIMS

7. This is an action for copyright infringement under 17 U.S.C. § 101 *et seq.*, for breach of contract, and for related causes of action arising in connection with the unauthorized distribution and use of the Changepoint Software as detailed herein.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1332(a) (diversity).

9. The Court has personal jurisdiction over Dell Global because Dell Global operates and conducts continuous and systematic business in Texas. Additionally, the claims alleged in this Complaint arose out of Dell Global's acts and omissions in Texas, and Dell Global's acts complained of in this Complaint (both inside and outside Texas) have an effect in Texas.

10. This case arises in connection with March 31, 2012 Master Relationship Agreement (the “Master Relationship Agreement”) between Dell Global and Changepoint’s predecessor in interest, which provides that this Court shall be the exclusive forum for determination of any such dispute.

11. Venue is proper under 28 U.S.C. § 1391(b), (c), and (d) and 28 U.S.C. § 1400 (a).

CONDITIONS PRECEDENT

12. All conditions precedent to assert the claims alleged in this Complaint have been performed or have occurred, including any contractual requirements for pre-suit dispute resolution.

BACKGROUND FACTS

Changepoint and Its Popular Changepoint Software

13. Changepoint is a leading provider of work management software. The Changepoint Software is a professional services automation product, most commonly used by businesses providing professional services or work through contract-based engagements. The Changepoint Software is designed to enhance its users’ management of progress, knowledge, tasks, resources, staff, expenses, invoicing, and a wealth of other information related to its user’s work projects. One key to the Changepoint Software’s success is that it enables its users to manage many of the complex aspects of their business engagements in a streamlined manner with one product.

14. The Changepoint Software is quite popular and has earned several market awards and recognition. For example, Changepoint won a prestigious “TechBEST” award in 2013 and was a finalist for the “TechBEST” award in 2014. Market research firm Gartner, Inc. named Changepoint as the only technology provider leader in both of its “Magic Quadrant” reports in 2016.

15. Changepoint has registered the copyright in its Changepoint Software and owns valid copyrights in the Changepoint Software for all material times.

Changepoint and Dell's Software License Arrangement

16. Dell Global is a multinational computer technology company that uses the Changepoint Software in its IT services business to process all of Dell Global's IT services client engagements. The Changepoint Software is an essential tool for Dell Global's IT services business because its utility and functionality is deeply imbedded in a vast amount of Dell Global's IT services client contracts and associated revenue.

17. The value of the Changepoint Software to Dell Global is reflected, in part, by Dell Global's long relationship with the Changepoint Software. Dell Global has been licensing the Changepoint Software from Changepoint's predecessor since at least as early as 1997. Over the years, Dell Global has licensed at least eleven different versions of the Changepoint Software and has paid Changepoint and Changepoint's predecessor substantial licensing and services fees to obtain the benefits of using the Changepoint software.

18. Prior to 2012, Dell Global and Changepoint's predecessor had a licensing arrangement by which Dell's Changepoint licenses were counted on a fixed user basis. In 2012, Changepoint's predecessor and Dell Global revised their contractual software licensing relationship, and entered into a new agreement by which Dell Global was allowed to use the latest version of the Changepoint Software under an "enterprise license" licensing format, rather than the prior fixed user format.

19. Effective March 31, 2012, Dell Global and Changepoint entered into a Master Relationship Agreement and a related Software Schedule to effectuate this "enterprise license."

20. The Master Relationship Agreement provides that the terms and conditions of the Master Relationship Agreement apply to all Schedules and purchase orders between Dell Global and Changepoint. In the event of any conflict, the order of precedence of the writings is (i) the Master Relationship Agreement; (ii) the Software Schedule; and then (iii) purchase orders.

21. Pursuant to the Master Relationship Agreement, Dell Global paid Changepoint to modify Dell Global's prior license for the Changepoint Software to the "enterprise license" format. Under that same agreement, Dell Global also paid Changepoint for maintenance services for the Changepoint Software. As described above, the license issued under the 2012 Master Relationship Agreement followed and reflected the value of an almost 20 year licensing history between the parties.

22. Since execution of the Master Relationship Agreement, Changepoint has upgraded the Changepoint Software and provided Dell Global with a new version and "service packs" for the Changepoint Software.

23. The current version of the Changepoint Software utilized by Dell Global, and the version at issue in this dispute, is "Changepoint 2014."

24. Changepoint 2014 is registered with the United States Copyright Office under Registration No. TX0007976096.

25. Under §9.3 of the Master Relationship Agreement, Dell Global expressly acknowledged and agreed that title to and full ownership rights in the Software licensed under the Agreement — and all intellectual property rights therein including patent, copyright, trademark and trade secret rights — shall remain with Changepoint or, where applicable, its third party providers.

26. Under the Master Relationship Agreement, Dell Global expressly agreed that except as expressly set forth in the Agreement, Dell shall not sublicense, distribute, modify or create derivative works of, reverse assemble, reverse compile, or otherwise reverse engineer the Software.

27. Under the Software Schedule, Changepoint provided Dell Global an irrevocable, nonexclusive, royalty-free, fully paid up, perpetual, worldwide, multi-language (as available from Changepoint) license to install, reproduce, deploy, use, perform, execute and run an unlimited number of copies of the Software and on an unlimited number of users, computers, servers and networks, owned or operated by or for Dell or its suppliers, customers and contractors, but only for Dell's internal business purposes and for Dell's benefit ("Enterprise License").

28. Pursuant to the Master Relationship Agreement and the Software Schedule, Dell Global expressly agreed that Dell Global can only allow another entity to use and/or benefit from the Changepoint Software (without incurring additional license fees) if Dell Global (1) acquires the other entity, or (2) is acquired or sells substantially all of its assets to the other entity.

NTT DATA International LLC Acquires Dell Global's IT Services Business and a New Licensing Arrangement is Proposed

29. On May 17, 2016, Dell Global sent Changepoint a letter (the "Separation Letter") advising Changepoint that Dell Global and NTT DATA International LLC ("NTT DATA"), "have entered into a definitive agreement for NTT DATA or its affiliates to acquire Dell's IT services business." The Separation Letter asked Changepoint to execute a new software license agreement between Changepoint and NTT DATA, by which NTT DATA could use the Changepoint Software pursuant to a "duplicate" of Dell Global's existing license.

30. The Separation Letter, and the proposed “duplicate” software license, were signed by Kevin Brown, Vice President, Global Operations & Chief Supply Chain Officer, Dell, Inc. and David Croxville, Chief Financial Officer, NTT DATA International LLC.

31. The Separation Letter asked Changepoint to agree that NTT DATA could use and/or benefit from the Changepoint Software under the terms of the Master Relationship Agreement and Software Schedule without incurring any additional license fees.

32. Before its sale to NTT DATA, Dell Global’s IT services business employed or contracted with approximately 32,000 persons or entities who were using the Changepoint Software under the Master Relationship Agreement and the Software Schedule.

33. Changepoint did not agree to Dell Global’s proposal, and did not consent to NTT DATA’s use of the Changepoint Software.

34. In subsequent correspondence related to the Separation Letter and proposed “duplicate” license between Changepoint and NTT DATA, Dell Global expressly acknowledged that it both needs and lacks permission to grant NTT DATA access to or use of the Changepoint Software.

35. During a meeting between representatives of Dell Global and Changepoint on or about October 24, 2016, Changepoint again advised Dell Global that NTT DATA cannot use or enjoy the benefits of the Changepoint Software absent execution of an agreed software license for NTT DATA, and that any unauthorized sublicense or distribution of the Changepoint Software by Dell Global to NTT DATA is a violation of the Master Relationship Agreement, the Software Schedule, and Changepoint’s exclusive rights under the Copyright Act.

36. On November 1, 2016, Dell Global sold its IT services business to NTT DATA.

37. Dell Global's IT services business did not constitute substantially all of Dell Global's assets.

38. Now that the sale to NTT DATA has closed, Dell Global's IT services business is no longer owned by or affiliated with Dell, and is owned by NTT DATA. The 32,000 persons or entities who previously used the Changepoint Software under the Master Relationship Agreement and Software Schedule are now using it without any right to do so.

39. Dell Global is allowing and enabling NTT DATA to use and/or benefit from the Changepoint Software. Said use is not for Dell Global's internal purposes, and NTT DATA is not using the Changepoint Software as a contractor for Dell Global's benefit. Said use violates the Master Relationship Agreement, the Software Schedule, and Changepoint's exclusive rights under the Copyright Act.

COUNT I
COPYRIGHT INFRINGEMENT
BY DELL GLOBAL BV

40. Changepoint realleges and incorporates the foregoing paragraphs 1 – 39 as if fully set forth herein.

41. By its actions described above, Dell Global has willfully infringed and/or acted with reckless disregard of Changepoint's copyrights in the Changepoint Software. Specifically, by distributing, sublicensing, copying, or otherwise exploiting the Changepoint Software for the benefit of NTT DATA, Dell Global has infringed Changepoint's exclusive rights, and Dell Global knew or had reason to know that such use was unauthorized.

42. Changepoint is entitled to actual damages for Dell Global's violation of Changepoint's copyrights, plus Dell Global's profits, and/or statutory damages of up to \$150,000 per work infringed, plus attorneys' fees and costs.

COUNT II
BREACH OF LICENSE AGREEMENT
BY DELL GLOBAL BV

43. Changepoint realleges and incorporates each and every allegation contained in paragraphs 1 – 41 as though fully set forth herein.

44. The Master Relationship Agreement and Software Schedule granted conditional rights to Dell Global to utilize the Changepoint Software.

45. Dell Global violated the Master Relationship Agreement and the Software Schedule by, among other things, allowing NTT DATA to use and/or benefit from the Changepoint Software in violation of the Master Relationship Agreement and Software Schedule, and sublicensing the Changepoint Software without authorization.

46. As a result of Dell Global's actions, NTT DATA is using and benefitting from the use of the Changepoint Software without authorization and in violation of Changepoint's rights.

47. Dell Global's actions were done knowingly and willfully, and its breaches of the parties' contract were committed in bad faith.

48. Changepoint has satisfied all of its obligations under the Master Relationship Agreement and Software Schedule, and has satisfied all conditions to the commencement of this action under the same.

49. As a foreseeable and probable result of the aforesaid conduct, Dell Global has deprived, and will continue to deprive, Changepoint of control over and licensing of the Changepoint Software, of goodwill, and has injured Changepoint's relations with other potential licensees or authorized users of the Changepoint Software.

50. Changepoint has lost or will lose license revenue for the Changepoint Software as a result of Dell Global's actions, and has sustained and will sustain damages as a result of Dell Global's breach of contract, wrongful conduct, and infringement.

51. Unless enjoined by this Court, Dell Global will continue its course of conduct, and wrongfully use, infringe upon, sell, sublicense, and/or otherwise profit from its wrongful use of the Changepoint Software and works derived therefrom. As a direct and proximate result of the acts of Dell Global alleged in this Complaint, Changepoint has already suffered irreparable damages in loss of control of its Changepoint Software, and has sustained damages including but not limited to lost revenues and profits.

52. Changepoint has no adequate remedy at law to redress all of the injuries Dell has caused and continues to cause. Changepoint will continue to suffer irreparable injury and to sustain damages until Dell Global's continuing infringement and actions alleged herein are enjoined by this Court. Changepoint is entitled to a permanent injunction restraining Dell Global, and its agents and representatives and all persons acting in concert with it, from engaging in further such acts in violation of the copyright laws.

REQUEST FOR RELIEF

WHEREFORE, Changepoint prays for the following relief:

- a. That Dell Global be held to have infringed Changepoint's copyrights in the Changepoint Software;
- b. That Dell Global and its agents, employees, representatives and all other persons in active concert or privity or in participation with it, be enjoined from directly or indirectly infringing Changepoint's copyrights in its Changepoint Software or from continuing to use, copy, market, offer, sell, dispose of, license, lease, transfer, display, advertise, reproduce,

develop, or manufacture any works derived or copied from the Changepoint Software, or to participate or assist in any such activity;

c. That Dell Global and its agents, employees, and representatives and all other persons in active concert or privity or in participation with them, be enjoined to return to Changepoint any originals, copies, facsimiles, or duplicates of the Changepoint Software in its possession, custody, or control;

d. That Dell Global be enjoined to recall from all customers, clients, distributors, wholesalers, jobbers, dealers, retailers, non-Changepoint licensed customers, and distributors and all others known to Dell Global any originals, copies, facsimiles, or duplicates of any works shown by the evidence to infringe any Changepoint copyright;

e. That Dell Global be enjoined to deliver upon oath, to be impounded during the pendency of this action, and for destruction pursuant to judgment herein, all originals, copies, facsimiles or duplicates of any work shown by the evidence to infringe any Changepoint copyright;

f. That Dell Global be required to file with the Court and to serve on Changepoint within thirty (30) days after service of the Court's Order as herein prayed, a report in writing under oath setting forth in detail the manner and form in which it complied with the Court's Order;

g. That judgment be entered for Changepoint and against Dell Global for Changepoint's actual damages for infringement of Changepoint's copyright and/or breach of contract according to proof, and for any additional profits attributable to infringements of Changepoint's copyright and/or breach of contract, in accordance with proof;

h. That judgment be entered for Changepoint and against Dell Global for statutory

damages based upon any and all acts of infringement, as well as increased damages for knowing and willful infringement, as available pursuant to the Copyright Act, 17 U.S.C. §101 et seq.;

i. That Dell Global be required to account for all gains, profits, and advantages derived from its acts of infringement or for its other violations of law;

j. That all gains, profits, and advantages derived by Dell Global from its acts of infringement be deemed to be held in constructive trust for the benefit of Changepoint and awarded to Changepoint, along with appropriate interest;

k. That Changepoint have judgment against Dell Global for its costs and attorneys' fees pursuant to 17 U.S.C. § 505; and/or

l. That the Court grant such other and further relief as the Court deems proper.

JURY DEMAND

Changepoint asserts its rights under the Seventh Amendment to the U.S. Constitution and demands, in accordance with Federal Rule of Civil Procedure 38, a trial by jury on all issues.

DATED this 3RD day of February, 2017.

Respectfully submitted,

MCGINNIS, LOCHRIDGE & KILGORE, L.L.P.

Don H. Magee

State Bar No. 12811800

dmagee@mcginnislaw.com

April Lucas

State Bar No. 24046323

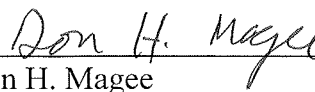
alucas@mcginnislaw.com

600 Congress Avenue, Suite 2100

Austin, Texas 78701

(512) 495-6000

(512) 495-6093 Fax


Don H. Magee

ATTORNEYS FOR PLAINTIFF